83-1049

No.

In The
Supreme Court of the United States
October Term, 1983

JOSE HARARI, SALVADOR HARARI and RENEE HARARI,
Petitioners,

v.

BACHE HALSEY STUART SHIELDS, INCORPORATED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Is the due process clause of the Fourteenth Amendment of the United States Constitution, as delineated in International Shoe Co. v. Washington, 326 U.S. 310 (1945), violated when the State of New York asserted in personam jurisdiction over Petitioners who are Mexican nationals and residents, who opened a non-discretionary account with Respondent, a non-New York corporation, in Texas, and whose only communications with Respondent took place in Texas; based upon the Petitioners maintaining inactive bank and brokerage accounts in New York, unrelated to the transaction, and interposing counterclaims in the action?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. JOSE HARARI
2. SALVADOR HARARI
3. RENEE HARARI
4. BACHE HALSEY STUART SHIELDS, INCORPORATED

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OPINIONS BELOW

The order of the New York State Court of Appeals denying leave to appeal has not yet been reported.

The order of the New York State Court of Appeals dismissing the appeal, sua sponte, has not yet been reported.

The order of the Appellate Division, First Department, of the Supreme Court of the State of New York, affirming the judgment of the Supreme Court of the State of New York, County of New York, is reported at ___ App. Div. ___, 461 N.Y.S.2d 662 (1st Dep't 1983).

The judgment and decision of the Supreme Court of the State of New York, County of New York, have not been reported.

The ex parte Order of attachment and the order and decision of the Supreme Court of the State of New York, County

of New York, confirming the ex parte order of attachment has not been reported.

All of the above are included in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The order of the Appellate Division, First Department, of the Supreme Court of the State of New York was entered on March 29, 1983. A timely filed notice of appeal to the Court of Appeals of the State of New York was dismissed, sua sponte, by that Court on June 16, 1983. A timely filed motion for leave to appeal to the Court of Appeals of the State of New York (N.Y. CPLR 5514(a)) was denied on September 29, 1983, and this petition for certiorari was filed within 90 days of that date. American Railway Express Co. v. Levee, 263 U.S. 19 (1923).

STATEMENT OF THE CASE

This action was commenced by Respondent Bache Halsey Stuart Shields Incorporated ("Bache") to recover a deficit balance allegedly existing in Petitioners' commodities futures, securities and securities options accounts maintained with Bache. Bache's verified complaint consists of a single cause of action against the three defendants ("Hararis") in the amount of $156,869.98 plus interest at Bache's prevailing margin loan rate from February 12, 1980.

Hararis' verified answer denied that there was a deficit balance owing to Bache and alleged a number of affirmative defenses and counterclaims. These included a lack of jurisdiction, failure to state a cause of action, breach of contract, unauthorized transactions, violation of Federal Securities and Commodities laws, violation of statutory

and common law, public policy, negligence, fraud, breach of warranty, breach of fiduciary duty, exemplary damages, conversion and an accounting. The Hararis by way of counterclaim sought compensatory damages in the amount of $400,000.00 for losses sustained in their accounts and exemplary damages of $1,500,000.00.

Bache's verified reply consists of a general denial of the allegations of Hararis' counterclaims and several affirmative defenses.

On February 15, 1980, Bache obtained an ex parte order of attachment in the Supreme Court of the State of New York, County of New York, against certain property belonging to Petitioners situated in the State of New York. By order to show cause signed on February 20, 1980, plaintiff moved to confirm the ex parte order of attachment. By

affidavits dated March 6 and March 10, 1980, Petitioners opposed the confirmation of the ex parte order of attachment and requested that the order be vacated on the ground that the court lacked jurisdiction over the Petitioners, that the Respondent had failed to show a probability of success on the merits of their case, and that the defendants possessed valid counterclaims.

On or about March 19, 1980, the motion to confirm and the "cross-motion" to vacate the ex parte order of attachment were submitted to the Honorable Frank J. Blangiardo, who rendered a decision on April 8, 1980. Finally, on April 22, 1980, an order was signed by the Honorable Frank J. Blangiardo granting Respondent's motion to confirm the ex parte order of attachment and denying Petitioners' denominated cross-motion to vacate the ex parte order of attachment.

In his decision, Justice Blangiardo brushed aside Petitioners' contention that the court lacked jurisdiction over them and stated

> The attachment in this case does not offend "traditional notions of fair play and substantial justice" (see International Shoe Co. v. Washington, 326 U.S. 310) since the defendants have established purposeful contacts with this jurisdiction in maintaining bank accounts and having transactions carried out for them on the New York Commodities and Stock Exchanges.

During the pendency of the motion to confirm and the cross-motion to vacate the ex parte order of attachment, Petitioners served their answer to the complaint, in which is set forth as a fourth affirmative defense that the Petitioners were residents of Mexico, that Respondent is a foreign corporation with its principal place of business in

New York City, that the Petitioners have no contact with the State of New York other than the maintenance of certain bank accounts totally unrelated to the transactions sued upon in the complaint, that Respondent had improperly attempted to assert in personam jurisdiction over the Petitioners by attaching their assets, and that the court therefore did not have jurisdiction over the Petitioners.

At the conclusion of the trial, the court determined that it did have in personam jurisdiction over the Petitioners based upon the following facts: that the Petitioners had various securities and commodities dealings with the Respondent in New York over a significant period of time; that the Petitioners agreed that "they would be governed by the laws of the State of New York"; that as a basis

for securing credit from the Respondent the Petitioners referred the Respondent to their business relationship which they had maintained for some time with the Chase Manhattan Bank; that one of the Petitioners had come to New York at various times to conduct several financial undertakings; that the other Petitioners visited New York City in 1979 to open an (unrelated) account with the brokerage firm of Merrill, Lynch, Pierce, Fenner & Smith; that one of the Petitioners also opened an (unrelated) account with Citibank in New York City consisting of a checking account and a certificate of deposit in excess of $100,000; and that Petitioners have affirmatively used New York as a forum for litigating their claims (by way of counterclaim) against Respondent.

It is uncontroverted that all of the contacts between the Hararis and Bache were at Bache's office in San Antonio, Texas. The only connection adduced at trial between the Hararis, Bache and New York was that the monthly statements were prepared in New York and mailed directly to the Hararis in Mexico; that the margin loans for securing trading in the Hararis' account were arranged through Bache's New York office (not at the Hararis direction or request); and that Bache had selected the New York COMEX for the execution of the Hararis' orders. All confirmation slips for individual transactions, however, were sent from the San Antonio office.

As to Bache's selection of the New York COMEX for the execution of the Hararis' orders, it is most significant

to note that when the Hararis opened their account with Bache there was no discussion as to where or on what exchanges stocks and commodities were to be traded; that the Hararis never directed that any of their futures contracts be purchased on the New York COMEX; and that Bache was at all times free to execute any orders on the New York COMEX, the Chicago Commodities Exchange, the London Exchange, or any other exchange in which the Hararis' orders could be executed.

With respect to any bank accounts maintained by the Hararis in New York, the testimony at trial revealed that on May 20, 1975 a time deposit account was opened at Chase Manhattan Bank in the names of Jose and/or Salvador Harari, a savings account was opened in the name of Jose and/or Renee Harari on April 29,

1977, and a checking account was opened in the names of Jose and Salvador Harari on May 20, 1975. With respect to the time deposit account at Chase Manhattan Bank, it should be noted that it was opened with a $100,000 deposit but that there were no additional principal deposits made after the account was first opened on May 20, 1975. The savings account referred to above was opened with a $3,100 deposit on April 29, 1977 and no additional deposits were made. The initial deposit for the checking account in May of 1975 was $1,000 and there were either no other deposits made or one other small deposit made into that account.

The evidence also reveals conclusively that the Hararis were Mexican citizens who had never lived in any other country.

Thus, with respect to the period of time during which the Bache account was maintained, between May of 1978 and February of 1980, the only connections between the Hararis and New York were the bank accounts referred to previously, that Jose Harari had come to New York on one or two occasions in connection with his checking account and possibly a certificate of deposit, and that in September of 1979 he opened a securities account in New York with Merrill, Lynch, Pierce, Fenner & Smith.

The Hararis were thus compelled to defend this action in a jurisdiction thousands of miles from their residence; with which they had no contact relating to the transactions of the lawsuit; despite their timely and repeated objection; in violation of the due process clause of the Fourteenth

Amendment, as delineated by this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945).

REASONS FOR GRANTING THE WRIT

The decisions by the New York State Courts are in conflict with this Court's decision in International Shoe Co. v. Washington.

This Court delineated the in personam jurisdiction of the various states over non-residents in its decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The necessity to be physically present, Pennoyer v. Neff, 95 U.S. 714 (1877), gave way to a requirement that a non-physically present defendant only have sufficient contacts with the State attempting to assert in personam jurisdiction over him so as not to offend traditional notions of fair play and substantial justice.

The doctrine in International Shoe was later codified in New York in CPLR 302, the long arm statute. The same principle also applies to foreign

nationals under the law of comity. See Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Alexiou, 397 F. Supp. 1292 (S.D.N.Y. 1975).

Therefore, to obtain in personam jurisdiction over a defendant in a contract action, it must be shown that either the defendant is doing business in the State of New York (N.Y. CPLR § 301) or, pursuant to N.Y. CPLR § 302, that the defendant has transacted business within the State of New York and that the cause of action arose from such transaction of business.

Necessarily decisions relating to the appropriate application of sufficient contacts intertwine findings of fact on an ad hoc basis. This is not usually appropriate matter for review by this Court in the exercise of its discretion on granting writ of certiorari petitions.

This Petition, however, involves facts which have a national and international impact.

The Hararis, like so many others, are non-resident aliens, who have availed themselves of the services of a brokerage firm in Texas. One or more of them also had previously availed themselves, on a limited basis, of the services of banking institutions in New York. The action of New York to base in personam jurisdiction on the fact that various trades (which could have been made elsewhere), not made by request or direction of the Petitioners, were made on exchanges located in New York; and that one or more of the Petitioners maintained limited (in activity and amount) unrelated bank accounts in New York; offends the traditional concepts of fairness and substantial justice enunciated in

International Shoe and is, in particular regard to New York, a leading financial, banking and securities center, subject to frequent repetition.

The Hararis did not transact business in New York to subject them properly to N.Y. CPLR § 302(a)(1) jurisdiction in this transaction; nor did they "do business" in New York pursuant to N.Y. CPLR § 301 subjecting them to jurisdiction on any, even unrelated, causes of action.

The constitutionally proper test for determining whether a defendant is doing business in a State, as set forth by Justice Cardozo for New York in Tauza v. Susquehanna Coal Co., 220 N.Y. 259 (1917), is that the defendant must do business "not occasionally or casually, but with a fair measure of permanence and continuity." Id. at 267. It is

apparent that the Hararis under any test were not doing business within the State of New York and thus were not subject to its jurisdiction under CPLR 301.

Even under New York law, it is well settled that the mere existence of bank accounts in New York is insufficient for a finding that a defendant is doing business in this State. See Nemetsky v. Banque De Developpment, 48 N.Y.2d 962 (1978), citing Amigo Foods Corp. v. Marine Midland Bank, 39 N.Y.2d 391 (1976); Fremay, Inc. v. Modern Plastic Machinery Corp., 15 App. Div. 2d 235 (1st Dep't 1961); and Hastings v. Piper Aircraft Corp., 274 App. Div. 435 (1st Dep't 1948). New York recognized that "there are policy considerations which suggest that New York, as a commercial and banking center, should not require a foreign corporation to

defend an action in New York solely on the basis of a bank account maintained here." Majique Fashions Ltd. v. Warwick & Co. Ltd., 96 Misc. 2d 808 (Sup. Ct., New York County 1978), rev'd on other grounds, 67 App. Div. 2d 321 (1st Dep't 1979), citing Ames v. Senco Products, Inc., 1 App. Div. 2d 658 (1st Dep't 1955). To require foreign nationals to submit to the jurisdiction of New York courts based upon such insignificant contacts would have a chilling effect on their maintaining banking relationships with New York financial institutions. Those foreign nationals not dissuaded and thus subjected to suit would impose a needless burden on that State's judicial resources. This point is highlighted in this case where foreign nationals, the Hararis, conducted relatively small to their means, non-primary banking activities in that State.

New York has also recognized that the trading of a defendant's stock accounts on a New York exchange, without more, is not sufficient for a finding that the defendant was doing business pursuant to CPLR 301 or transacting business pursuant to CPLR 302 within the State of New York. Drexel Burnham & Co. v. Silverman, 75 Misc. 2d 904 (Civ. Ct., New York County 1973); Hertz, Newmark & Warner v. Fischman, 53 Misc. 2d 418 (Civ. Ct., New York County 1967). In both of the foregoing cases, trades were made by out-of-state stockbrokers for out-of-state residents on the New York Stock Exchange. As with the Hararis, no directions were given by the customers on which exchanges to make the trades. Those courts found that the conduct of the plaintiffs in executing the transactions on the New York Stock Exchange

was insufficient to confer in personam jurisdiction pursuant to CPLR 302(a)(1).

In this case there are even stronger reasons for holding that the execution by Bache of the Hararis' orders on the New York COMEX should not confer jurisdiction over the Hararis in the courts of that State. For in the Drexel Burnham and Hertz, Newmark cases, the customers, who were trading in stocks listed on the New York Stock Exchange, must have been aware when they gave the orders to the local out-of-state stockbrokers that the orders would be executed on the New York Stock Exchange. The Hararis, on the other hand, were primarily trading in gold futures, which could have been traded equally as well on the Chicago Commodities Exchange or on various European and Asian exchanges. Respondent unilaterally decided to execute the

orders on the New York COMEX, and at no time did the Hararis ever request or direct where the trades should be made. Thus, the Hararis cannot properly be subjected to in personam jurisdiction in New York because of Respondent's unilateral decision to trade on the New York COMEX. See Longines-Wittnauer Co. v. Barnes and Reinecke, Inc., 15 N.Y.2d 443 (1965), wherein the court, quoting Hanson v. Denckla, 357 U.S. 235 (1958), stated:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirements of contact with the forum state.... [I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

15 N.Y.2d at 451-452, quoting 357 U.S. at 253.

It is well established in New York law that the actions of an agent, as Bache was herein with respect to the Hararis, cannot be attributed to its principal in a suit where the agent is seeking to assert personal jurisdiction over the principal. Haar v. Armandaris Corp., 31 N.Y.2d 1040 (1973); Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 19, n. 2 (1970); and Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Alexiou, 397 F. Supp. 1292, 1293 (S.D.N.Y. 1975).

The Hararis were not "doing business" in New York nor, for all the reasons set forth above, can the Hararis constitutionally be subject to the jurisdiction of New York pursuant to N.Y. CPLR § 302(a)(1) for causes of action arising out of the transaction of business within the State of New York. As discussed

supra, to constitutionally obtain jurisdiction over a defendant pursuant to a transaction of business under CPLR 302, it must be shown that the defendant transacted business within the State of New York and that the cause of action arose out of that transaction of business. Accordingly, the fact that the Hararis had maintained bank accounts in New York, that they had opened an account with the brokerage firm of Merrill, Lynch, Pierce, Fenner & Smith, and that they came into the jurisdiction on two or three occasions to conduct unrelated financial dealings, that their agent (Bache) unilaterally decided to transact trades on New York exchanges cannot, pursuant to the due process clause of the Fourteenth Amendment as delineated in International Shoe Co. v. Washington, confer in personam jurisdiction in New York, inasmuch as

Respondent's cause of action had nothing whatsoever to do with the above-described activities.

The courts of New York have strayed from their previous decisions interpreting the N.Y. CPLR §§ 301 and 302. This has created a situation in which Petitioners have been subjected in violation of the due process clause of the Fourteenth Amendment to in personam jurisdiction in New York. This case is in direct conflict with the doctrine delineated in this Court in International Shoe Co. v. Washington. This erroneous view of the New York courts has a potentially national and international scope in that New York, in particular, is a center of international finance, banking and securities trading. The activities which the New York courts improperly assert form the basis for subjecting

Petitioners to New York's jurisdiction are similar to the activities of tens of thousands of others who, if this decision goes unreviewed, would be subject to the same constitutionally improper exercise of in personam jurisdiction.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Appellate Division, First Department, Supreme Court of the State of New York.

Respectfully submitted,

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(212) 832-3543

Counsel for Petitioners

December , 1983

ORDER OF THE NEW YORK STATE COURT OF APPEALS DENYING LEAVE TO APPEAL

AT A SESSION OF THE COURT, HELD AT COURT OF APPEALS HALL IN THE CITY OF ALBANY ON THE TWENTY-NINTH DAY OF SEPTEMBER A.D. 1983

PRESENT, Hon. Lawrence H. Cooke, Cheif Judge Presiding

Mo. No. 802

Bache Halsey Stuart Shields Incorporated,

Respondents,

vs.

Jose Harari, Salvador Harari and Renee Harari,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been submitted thereon and due deliberation thereupon, had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/ Joseph W. Bellacosa

JOSEPH BELLACOSA
CLERK OF THE COURT

ORDER OF THE NEW YORK STATE COURT
OF APPEALS DISMISSING THE APPEAL,
SUA SPONTE

AT A SESSION OF THE COURT, HELD
AT COURT OF APPEALS HALL IN THE
CITY OF ALBANY ON THE SIXTEENTH
DAY OF JUNE, A.D. 1983

PRESENT HON. LAWRENCE H. COOKE, Chief Judge Presiding

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1 Mo. No. 655 SSD 84
Bache Halsey Stuart Sheilds Incorporated,
Respondent.

vs.
Jose Harari, Salvador Harari,
and Renee Harari,
Appellants.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
CLERK OF THE COURT

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AFFIRMING THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the FIRST JUDICIAL DEPARTMENT in the County of New York on MARCH 29, 1983

PRESENT Hon. Francis T. Murphy, Jr. Presiding Justice
Theodore R. Kupferman
Samuel J. Silverman
Arnold L. Fein
Fritz W. Alexander, II Justices

Bache Halsey Stuart Shields Incorporated,

Plaintiff-Respondent,

-against-

16271

Jose Harari, Salvador Harari and Renee Harari,

Defendants-Appellants

An Appeal having been taken to this Court by the defendants-appellants from the judgment of the Supreme Court, New York County (Rubin, J.) entered on February 4, 1982, which awarded plaintiff, $215,719.63 plus interest, costs and disbursements against defendants, jointly and severally, and dismissed all defendants' counterclaims, and said appeal having been argued by Stephen Hochberg, of counsel for the appellants, and by Joel M. Miller, of counsel for the respondent; and due deliberation having had

thereon.

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed. Plaintiff shall recover of defendants one bill of $75.00 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk

JUDGMENT OF THE SUPREME COURT OF THE
STATE OF NEW YORK, COUNTY OF NEW YORK
IN FAVOR OF RESPONDENTS

At a Trial Term, Part 64, of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse, 60 Centre Street, New York New York, on the 4th day of February 1982.

Judgment Appealed From
[A -4-A-6]

P R E S E N T :
Hon. Isreal Rubin
Justice

BACHE HALSEY STUART SHIELDS INCORPORATED Plaintiff -against- JOSE HARARI, SALVADOR HARARI and RENEE HARARI Defendants.	Index No. 03116/80 Trial Term Part 64 JUDGMENT

The Issues in the above captioned action were tried before Mr. Justice Sidney Asch, without a jury, at Trial Term, Part 64, of this Court, on October 13, 14, 15, 16, 19, 20, 21, 22, 23, 26, 27, 28, 29, and 30 and on November 23 and 24, 1981.

Plaintiff Bache Halsey Stuart Shields Incorporated appears by its attorneys, Miller, Wrubel & Dubroff, a

professional corporation. Defendants Jose Harari, Salvador Harari and Renee Harari appeared by their attorneys Vincenti & Schickler.

The Court (Hon. Sidney H. Asch) made and filed its decision in writing on December 31, 1981.

The Court found in favor of plaintiff Bache Halsey Stuart Shields Incorporated and against defendants Jose Harari, Salvador Harari and Renee Harari, Jointly and severally, and directed entry of judgment against those defendants, jointly and severally, in the aggregate amount of $215, 719.63 as of September 30, 1981, plus interest to judgment.

The Court dismissed the defenses and counterclaims pleaded by defendants Jose Harari, Salavador Harari and Renee Harari.

NOW, on motion of Miller, Wrubel & Dubroff, a professional corporation, attorneys for plaintiff Bache Halsey Stuart Shields, Incorporated, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff Bache Halsey Stuart Shields Incorporated, residing at 100 Gold Street, New York, New York, recover of defendants Jose Harari, Salvador Harari and Renee Harari, residing at 161 Fuente de Las Aguilas,

Mexico City, Mexico, jointly and severally, the aggregate amount of Two Hundred Fifteen Thousand, Seven Hundred and and Nineteen Dollars 63/100 ($215,719.63) as of September 30, 1981, plus interest to judgment in the sum of $6,795.16 and costs and disbursements in the sum of $5,414.00 as taxed, amounting in all to $227,928.77 and that plaintiff Bache Halsey Stuart Shields Incorporated have execution therefor; and it is further

ORDERED, ADJUDGED AND DECREED, that the counter-claims of all defendants against plaintiff are dismissed

ENTER

(SIGNED PURSUANT TO 9002 CPLR)

_____
J.S.C.

s/ NORMAN GOODMAN
NORMAN GOODMAN

FILED
FEBRUARY 4, 1982
COUNTY CLERK OFFICE
NEW YORK

MEMORANDUM DECISION OF SIDNEY H. ASCHE JR.,

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 64

BACHE, HALSEY, STUART, SHIELDS INC.,
Plaintiff

-against-

INDEX
03116/80

JOSE HARARI, SALVADOR HARARI and RENEE HARARI,
Defendants

SIDNEY H. ASCH, J.:

This is an action brought by Bache, Halsey, Stuart, Shields, Inc, a brokerage firm, which is suing to recover damages in the principal sum of $156,869.98 from defendants.

After a non-jury trial which lasted sixteen days, and required more than 2,000 pages of transcripts, with 59 exhibits received in evidence, the Court decided in favor of the plaintiff. The facts adduced clearly establish liability even if uncontroverted facts alone are examined and most certainly upon the resolution of those facts which were in dispute.

The threshold question relates to the jurisdiction of the Court. It seems clear that the Court does have in personam jurisdiction over the parties (CPLR 302 (a)(1).

The facts indicate that the defendants had various securities and commodites dealings with the plaintiff in New York over a significant period of time. Furthermore, defendants agreed that with respect to their accounts that they would be "governed by the laws of the State of New York."

As a basis for securing credit from the plaintiff, the defendants referred plaintiff to their business relationship which they had maintained for sometime with the Chase Manhattan Bank.

Harari, in addition, stated that he had come to New York at various times to conduct several financial undertakings. Apparently the other defendants visited New York City in 1979 to open an account with the brokerage firm of Merrill Lynch, Pierce, Fenner & Smith. Defendant Harari also opened an account with Citibank in New York City, consisting of a checking account and a Certificate of Deposit in excess of $100,000.00

In addition, defendants affirmatively have used New York as a forum for litigating their claims against plaintiff. By seeking affirmative relief, as defendants have done here, they have automatically subjected themselves to the in personam jurisdiction of the courts of this state (Flaks, Zaslow & Co. V. Bank Computer Network

Corp., 66 A D 2D 363). This disposes of the question of jurisdiction.

Another preliminary question relates to the fact that the court received into evidence various written agreements between the parties. Defendants objected on the grounds of CPLR Section 4544 which proscribes the admission of contracts printed in a small size type, if that agreement constitutes a "consumer transaction" defined as:

> "A transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes" (underscoring added)

Mere perusal of the statute makes it clear that it is not applicable to the transaction which are involved in this litigation. The contention is for "personal, family or household purposes" simply because the parties are members of the same family is not persuasive. The courts of New York have applied this interpretation in restricting the application of the phrase "consumer transactions" in this way. (See, e.g. State v. Strong Oil Co., Inc., 105 Misc. 2d 803; Donnelly v. Mustang Pools, Inc., 84 Misc. 2d 28; cf. Recchio v. Mfrs. & Traders Trust Co., 35 A.D. 2d 769).

The critical legal doctrine which governs this case is that the obligation of a broker to his customer who is an experienced business mand and who reserves

the final decisions as to investments for himself, is no more than merely carrying out the orders of the customer in good faith and also when requested, to advise him of facts which are significant. The evidence makes it clear that by January 1980, the defendants acting through Jose Harari, were experienced in trading commodity futures contracts. There was nothing brought out which indicates that the plaintiff did not execute defendants' orders in good faith or fail to supply all significant information.

Jose Harari was no business novice beguiled by the representations of the plaintiff. He was a substantial business man and had engaged in many transactions involving financing and real estate. He had invested hundreds of thousands of dollars in the Mexican stock market and had accumulated personal assets of more than $2,000,000.00.

When the defendants opened the account through Jose Harari, the account executive for plaintiff told Jose Harari, of the possibility of a discretionary account by which the brokerage firm would decide as to appropriate purchases and sales. Harari specifically rejected this type of an account.

By written agreements, the defendants agreed with plaintiff: To maintain such margins as plaintiff in its

discretion may require; to pay on demand any debit balance; that plaintiff would have the right without prior demand to sell or buy securities or commodities contracts as necessary for plaintiff's protection; and that defendants' liability would be "joint and several".

The defendants also signed a Commodities Suitability Letter by which they represented that their "total net worth" was $1,000,000.00 with "Total Net Liquid Assets " of $400,000.00. They acknowledged that trading in commodities is "subject to rapid fluctuations" and presenting "inherent risks". Nevertheless, they assured plaintiff that trading in commodities was a "suitable trading vehicle" for them.

From the inception of this lengthy trial much emphasis was placed on the apparent inability of Jose Harari in the use and comprehension of English. Mr. Jose Harari nevertheless seemed to have a fair command of the language. And certainly none of the defendants expressed any difficulty in comprehending the contents of these documents nor did they ask for any assistance. In a commercial transaction such as

this between sophisticated and experienced parties, even if a signatory does not understand English where that party can obtain assistance but fails to request such, the law is clear that the party is not excused from the obligations imposed by the agreement. (See, First National Bank of Odessa v. Fazzari, 10 N.Y. 2d 394; Pimpinello v. Swift & Co., 253 N.Y. 159, 162-163; James Talcott, Inc., v. Wilson Hosiert Co., 32 A.D. 2d 524; Humble Oil & Refining Co. v. Jaybert Esso Service Station, Inc. 30 A.D. 2d 952).

The defendants on their own sold short December 1980 Comex Gold Futures Contracts toward the end of 1979. They consistently maintained a net short position in their account although the plaintiff's account executive consistently recommended that the defendants liquidate their short positions or at least protect themselves by hedging. As a result, there was a substantial open loss in defendants' gold futures contracts stemming from defendants' own decision, to remain short December 1980 gold futures contracts.

At this time, Jose Harari communicated with the plaintiff's account executive several times a week. And during January 1980, at a time when the gold futures market was fluctuating wildly, the two consulted with

each other usually several times a day. Jose Harari admitted that the account executive reported everything to him and conceded that invariably between May 1978 and June 24, 1980, the account executive reported "all the transactions that were made in the account" before the transaction was executed and that following each transaction there was a report of the prices. There is no doubt that on the 14, 15, 16 and 17 of January 1980 when the gold futures market was turbulent, Jose Harari himself authorized every transaction. Although while testifying Harari claimed that he believed that he was being "protected" with respect to each transaction at the time that these transactions were actually taking place, it was beyond dispute that he knew about each transaction which caused losses and authorized each of these transactions. The defendants never indicated, until after this law suit was initiated that they would not furnish the additional money necessary to meet their deficient credit balance. As a matter of fact, at a meeting held on January 31, 1980, in Mexico City, Jose Harari offered to pledge a non-negotiable Certificate of Deposit held at the Chase Manhattan Bank in New York as collateral for payment. At a meeting

held February 8, 1980, in San Antonio, Harari acquiesced in the loss, stating "I accept the loss."

There are many cases which have held that where there is a chaotic market condition and the customer's account is in default, it is not unreasonable for the broker to liquidate the account without notice where the customer's agreement so provides. (Geldermann & Co. v. Lane Processing, Inc., 527 F 2d 571; Shearson Hayden Stone, Inc. v. Lumber Merchants, Inc 500 F. Supp. 491; Scheneck v. Bear, Stearns, & Co., 484 F. Supp. 937; E.F. Hutton & Co., v. Burkholder, 413 F. Supp. 852; Fisch v. Banks, 58 Misc. 2d 839).

This is the law in the First Department, (See, Raisis v. Eisele & King, Libaire, Stout & Co., 20 A.D. 2d 392, aff'd mem. 16 N.Y. 2d 557; Hirsch & Co., v. Pattiz, 19 A.D. 2d 607).

On evaluation of the testimony and documents received in evidence, it has been amply established that the plaintiff fulfilled its obligations as as broker and the defendants have not succeeded in proving the allegations on which their defenses or counterclaims rest.

All through the trial, the defendants urged that certain clerical errors made by plaintiff should preclude recovery by plaintiff. But there was never any proof that there was error relied upon by the defendants causing any of the damages alleged. None of the errors were relied upon by either party and most were corrected very promptly. These errors were incidents of doing business in a confused and changeable commodities market. Moreover, defendants did not establish to the satisfaction of the Court, that plaintiff violated New York Stock Exchange Rule #405. In any event, any violation of its in-house rules is legally irrelevant.

Theories advanced by defendants as to fraud, the antifraud provisions of the Federal Securities and Commodities Laws, breach of warranty, conversion were inapposite or not established.

Accordingly, this Court awards judgment in favor of the plaintiff and against defendants, jointly and severally in the aggregate amount of $215,719.63 as of September 30, 1981, plus interest to judgment and dismisses defendants' defenses and counterclaims. Settle judgment.

DATED ,December 31, 1981 s/_____
J.S.C.

ORDER OF HON. FRANK BLANGIARDO, J. GRANTING PLAINTIFF'S MOTION FOR AN ORDER CONFIRMING THE EX PARTE ORDER OF ATTACHMENT AND DENYING DEFENDANTS' CROSS-MOTION TO VACATE SAID EX PARTE ORDER OF ATTACHMENT

At a Special Term, Part I of the Supreme Court of the State of New York, Held in and for the County of New York, at the Courthouse thereof 60 Centre Street, New York, New York on the 22 day of April 1980.

P R E S E N T
Hon. Frank J. Blangiardo,
Justice

BACHE HALSEY STUART SHIELDS INC.

Plaintiff

-against-

JOSE HARARI, SALVADOR HARARI AND RENEE HARARI,

Defendants

Index No 03116/80

ORDER

Plaintiff, Bache Halsey Stuart Shields, Inc., having moved for an order pursuant to CPLR § 6211, confirming the ex parte Order of Attachment herein dated February 15, 1980 and for such other relief as to this Court shall seem just and proper; and defendants, Jose Harari, Salvador Harari and Renee Harari, having cross-moved for an order pursuant to CPLR § 6223 vacating the Order of Attachment.

Upon reading and filing: (i) the Order to Show Cause, dated February 20, 1980; (ii) the Affidavit of Frank Geremia, sworn to February 20, 1980, and the exhibits annexed thereto; (iii) the Affidavit of Jose Carabaza, sworn to March 14, 1980, and the exhibit annexed thereto; (iv) the Affidavit of Joel M. Miller, sworn to March 19, 1980, all in support of the Motion and in opposition to the Cross-Motion; and (v) the Affidavit of Renee Harari, sworn to March 6, 1980: (vi) the Affidavit of Jose Harari, sworn to March 6, 1980, and the exhibits annexed thereto; and (vii) the Affidavit of Mario Diaz-Cruz, III sworn to March 10, 1980, all in opposition to the Motion and in support of the Cross-Motion; and due deliberation having been had and the Court having rendered its decision in writing dated April 8, 1980;

NOW on the motion of Ullman, Miller & Wrubel, P.C. attorneys for plaintiff Bache Halsey Stuart Shields Incorporated it is hereby,

ORDERED that plaintiff's motion for an order confirming the ex parte Order of Attachment is granted; and it is further

ORDERED that the defendants' cross-motion for an order vacating said ex parte Order of Attachment is denied.

E N T E R

_____
J.S.C.

FILED

APRIL 25, 1980

MEMORANDUM DEICISON OF BLANGIARDO J.

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK CONFIRMING THE EX PARTE ORDER OF ATTACHMENT

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

----------x

BACHE HALSEY STUART SHIELDS INCORPORATED.

Plaintiff

Index No 03116/80
#130 3/20/80

-against-

JOSE HARARI, SALVADOR HARARI AND RENEE HARARI

Defendant

----------x

BLANGIARDI, J. :

This is a motion by the plaintiff for an order confirming an ex parte order of attachment. Also the defendants have cross-moved for an order vacating the said attachment on the basis that this court lacks jurisdiction over the defendants and that the plaintiffs have failed to show a probability of success on the merits of their case while the

defendants possess valid counterclaims.

Plaintiff's motion is granted and the defendants' motion is denied. The attachment in this case does not offend "traditional notions of a fair play and substantial justice." (see International Shoe Co. v. Washington, 326 U.S. 310) since the defendants have established purposeful contacts with this jurisdiction in maintaining bank accounts here and having transactions carried out for them on the New York commodities and stock exchanges. Plaintiff has made an adequate demonstration of a likelihood of succeeding on its claims while this court forms no opinion as to the merits of the defendants' alleged counterclaims.

It is noted in possim that the parties have an agreement seemingly calling for the arbitration of disputes. Although the defendants have brought this to the court's attention they have not made an application for the stay of this action, Therefore, the court will make no ruling on the possible staying of this action at this time.

Settled order.

DATEDL April 8, 1980

J.S.C.

EX PARTE ORDER OF ATTACHMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

At a Special Term Part II, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof at 60 Centre Street, on the 15th day of February 1980.

P R E S E N T

HON. PEGGY BERNHEIM
Justice.

BACHE HALSEY STUART SHIELDS, INCORPORATED

Plaintiff

-against-

JOSE HARARI, SALVADOR HARARI and RENEE HARARI,

Defendants.

Index No. 03116/80

ORDER OF ATTACHMENT

A motion having been made by the plaintiff Bache Halsey Stuart Shields Incorporated for an Order of Attachment against the property of defendants Jose Harari, Salvador Harari and Renee Harari, in an action in the Supreme Court of the State of New York, County of New York.

NOW, on reading the affidavit of Mark Molloy, duly sworn to the 14th day of February, 1980, wherein it appears a cause of action for a money judgment

exists in favor of plaintiff and against defendants, liable jointly and severally, for the sum stated in said affidavit and in the verified complaint herein, namely $156,869.98 plus interest, costs and disbursements, and that plaintiff is entitled to recover said sum above all counterclaims known to it and it is probable that the plaintiff will succeed on the merits.

AND it further appearing that plaintiff is entitled to an Order of Attachment against the property of defendants in the sum of $56,869.98

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on the ground that each defendant is a non-domiciliary not residing within the State of New York and the undertaking required by law having been submitted herewith;

It is, on the motion of Ullman, Miller & Wrubel, P.C. attorneys for plaintiff

ORDERED that plaintiff's undertaking be, and the same hereby is, fixed in the sum of Thirty Four Thousand Eight Hundred and Eighty Five Dollars and Twelve Cents ($34,885.12) of which amount the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents ($8,721.28) is conditioned

that plaintiff will pay to defendant Jose Harari all costs and damages which may be sustained by reason of the attachment if the defendant recovers judgment, or if it is finally determined that plaintiff if not entitled to an attachment of defendants property, and the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents ($8,721.28) is conditioned that plaintiff will pay to defendant Salvador Harari all costs and damages which may be sustained by reason of the attachment if that defendant recovers judgment, or it if is finally determined that plaintiff is not entitled to an attachment of that defendant's property, and the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents ($8,721.28) is conditioned that plaintiff will pay to defendant Renee Harari all costs and damages which may be sustained by reason of the attachment if that defendant recovers judgment, or if it is finally determined that plaintiff is not entitled to an attachment of that defendant's property, and the sum of Eight Thousand Seven Hundred and Twenty One Dollars and Twenty Eight Cents ($8,721.28)

is conditioned that plaintiff will pay to the Sheriff all of his allowable fees; and it is further

ORDERED, that the amount to be secured by this Order of Attachment, including interest, costs and Sheriff's fees and expenses shall be, as against defendant Jose Harari, One Hundred Seventy Four Thousand Four Hundred and Twenty Five Dollars and Sixty Cents ($174,425.66) and, as against defendant Salvador Harari, One Hundred Seventy Four Thousand Four Hundred and Twenty Five Dollars and Sixty Six Cents ($174,425.66) and, as against defendant Renee Harari, One Hundred Seventy Four Thousand Four Hundred and Twenty Five Dollars and Sixty Six Cents ($174,425.66); and it is further

ORDERED that the Sheriff of the City of New York or the Sheriff of any county of the State of New York attach:

(a) property of Jose Harari within his jurisdiction, at any time before final judgment by levy upon any interest of said defendant in personal property or upon any debt owed to said defendant, and upon any interest of said defendant, in real property within his jurisdiction as will satisfy the aforesaid sum of One Hundred Seventy Four Thousand Four Hundred Twenty Five Dollars

and Sixty Six Cents ($174,425.66).

(b) property of Salvador Harari within his jurisdiction, at any time before final judgment by levy upon any interest of said defendant, in personal property or upon any debt owed to said defendant, and upon any interest of said defendant, in real property within his jurisdiction as will satisfy the aforesaid sum of One Hundred Seventy Four Thousand Four Hundred Twenty Five Dollars and Sixty Six Cents ($174,425.66) and

(c) property of Renee Harari within his jurisdiction, at any time before final judgment by levy upon any interest of said defendant, in personal property or upon any debt owed to said defendant and upon any interest of said defendant, in real property within his jurisdiction as will satisfy the aforesaid sum of One Hundred Seventy Four Thousand Four Hundred Twenty Five Dollars and Sixty Six Cents ($174,425.66), provided that the total amount attached not exceed $174,425.66 and that he hold and safely keep all such property and debts paid, delivered, transferred or assigned that may be granted against defendants in this action, and that he proceed herein in the manner required by law, and it is further

ORDERED that plaintiff shall move within five days after levy hereunder on notice to defendants, the garnishees, if any, and the Sheriff making any levy herein for an order confirming this Order of Attachment.

E N T E R
WITHIN TEN DAYS

s/ PB
JUSTICE OF THE SUPREME COURT

ULLMAN, MILLER & WRUBEL. P.C.
Attorneys for Plaintiff
30 Rockefeller Plaza
New York,New York 10020
(212) 265 4200

I, Joan H. Gregory, an Attorney at Law do hereby certify pursuant to Rule 2105 that **********
****

s/ Joan H. Gregory

No.83-1049

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSE HARARI, SALVADOR HARARI and
RENEE HARARI,

Petitioners,

v.

BACHE HALSEY STUART
SHIELDS INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOEL M. MILLER
Attorney for Respondent
30 Rockefeller Plaza
New York, New York 10112

Of Counsel:
MARTIN D. EDEL
CHARLES R. JACOB III
HOWARD A. GOOTKIN
MILLER & WRUBEL P.C.
30 Rockefeller Plaza
New York, New York 10112
(212) 265-4200

STATEMENT PURSUANT TO
SUPREME COURT RULE 28.1

The following are parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent Prudential-Bache Securities Inc. (formerly known as Bache Halsey Stuart Shields Incorporated):

The Prudential Insurance Company of America
PRUCO, Inc.
Prudential Capital and Investment Services Inc.
Bache Group Inc.
Prudential-Bache Leasing Inc.
Prudential-Bache Commodity Management Company, Inc.
Bache Securities Inc.
Bache Commodities Ltd.
Bache Guinness Mahon Futures Limited
Prudential-Bache Metal Co. Inc.
Bache Precious Metals, Inc.
Prudential-Bache Energy Corp.
Prudential-Bache Latin America Inc.
Prudential-Bache Southern Europe Inc.
Prudential-Bache Properties, Inc.
Halsey Stuart Corporate Services Limited
Bache Halsey Stuart Shields Holding Corporation
Prudential-Bache Agriculture Inc.
Bache Insurance Agency of Louisiana, Inc.
Bache Insurance Agency of Nevada, Inc.
Prudential-Bache Energy Production Inc.
P-B Finance Ltd.
Prudential-Bache Venture Capital Inc.
Bache Insurance Agency of Arkansas, Inc.
R & D Funding Corp.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the New York courts have personal jurisdiction, consistent with the due process clause of the Fourteenth Amendment of the United States Constitution and this Court's decision in International Shoe Co. v. Washington, 326 U.S. 310 (1945), over Petitioners, Mexican citizens, who:

(i) voluntarily and vigorously pressed to trial in New York State court their claims for affirmative relief against Respondent, even seeking leave to commence an action as plaintiffs in federal court in New York;

(ii) in connection with opening the securities and commodities account in dispute, asked Respondent to rely on their pre-existing relationship with Chase Manhattan Bank in New York City so that Respondent would (and did) extend credit to them in New York City;

(iii) to open that account, signed (a) an agreement in which they agreed the account would be "governed by the laws of the State of New York" and (b) other documents addressed to Respondent's New York City headquarters;

(iv) through their account, knowingly traded on securities and commodities exchanges located in New York City;

(v) maintained substantial and "active" bank and securities accounts with other financial institutions in New York City and personally came to New York City to deal with those accounts; and

(vi) offered funds in the Chase Manhattan Bank account in New York City in partial satisfaction of the debt which Respondent seeks to recover in this action?

2. Is a grant of certiorari provident to review the decision of a state court, where:

(i) reversal would not change the result below, as there is an adequate and independent state law basis for jurisdiction; and

(ii) there are no "special and important reasons" for granting a writ because: (a) as Petitioners concede, the dispute here is essentially factual; (b) there is no conflict between the decision below and any known federal court of appeals decision or decision of any other state court of last resort; (c) there is no unique question of federal law to be settled by this court; and (d) the decision below is not in conflict with applicable decisions of this Court?

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Appendix

TABLE OF AUTHORITIES

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Statutes and Rules

RESTATEMENT OF THE CASE

Petitioners' statement of the case requires correction for it fails to acknowledge the following relevant aspects of the case:

Petitioners were not required to assert their claims for affirmative relief against Respondent Prudential-Bache Securities Inc. (sued herein as Bache Halsey Stuart Shields Incorporated) in New York, yet they vigorously pressed those claims both in pre-trial motion practice and at trial, even seeking to have this action removed to the United States District Court for the Southern District of New York to avoid dismissal of claims asserted under those provisions of the federal securities and commodities laws as to which federal courts have exclusive jurisdiction (9a-10a).[1] By so doing, under

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1. Citations to Petitioners' Appendix are designated "a." Citations to Respondent's Appendix are designated "ra."

New York law Petitioners waived any objection they might have had to jurisdiction.

Moreover, as the Court below found, Petitioners had significant contacts with New York. They transacted substantial business in New York City, both personally and through agents. This dispute arises out of, inter alia, those transactions in New York.

Petitioners' New York dealings led to the opening of the account which is the subject of this action. To induce Respondent to extend them credit in New York, Petitioners asked Respondent to rely on Petitioners' longstanding relationship with Chase Manhattan Bank in New York City, which they provided as a credit reference. Respondent relied on this New York City banking relationship with Chase Manhattan Bank in New York and extended credit to Petitioners in New York City -- to Respondent's eventual detriment.

The trial court found that Petitioner Jose Harari had numerous contacts with New York, personally visiting it from time to time to transact business. In addition to opening their account with Respondent, Petitioners personally came to New York City to open a securities account with a New York City office of Merrill Lynch, Pierce, Fenner & Smith and Jose Harari came to New York City to open a deposit account with Citibank (9a).

During the time they maintained their account with Respondent, Petitioners required credit to be advanced to them in New York City by Respondent for purchase of securities and commodity futures contracts through Respondent on exchanges located in New York City.

Even after Petitioners' account was liquidated, Petitioners proposed using their

assets in New York City to satisfy their obligations to Respondent. As the trial court found, "at a meeting held January 31, 1980 in Mexico City, Jose Harari offered to pledge a non-negotiable Certificate of Deposit held at the Chase Manhattan Bank in New York" in the principal amount of $156,000.00 as "collateral" for Petitioners' obligation to Respondent (14a, emphasis added). This action was commenced in February 1980 by attachment of that certificate of deposit.

SUMMARY OF ARGUMENT

Granting a writ of certiorari in this case would violate this Court's long-standing rule that it will not review a state court decision which is based on an adequate and independent state ground. The trial court in this case found that under New York law Petitioners waived their objections to personal jurisdiction by asserting affirmatively, through trial, counterclaims which they were not obligated to litigate. Under longstanding New York law, by voluntarily invoking the jurisdiction of the New York courts, Petitioners were subject to in personam jurisdiction regardless of whether there were minimum contacts sufficient to satisfy International Shoe Co. v. Washington, 326 U.S. 310 (1945).

Even from the Petition it is clear that this case does not raise novel issues of

law or policy. This case involves the application to a complex factual situation of well-settled standards of personal jurisdiction enunciated by this Court. Granting a writ of certiorari would therefore involve this Court in a detailed factual evaluation which would be relevant only to the litigants in this case and of no practical value to anyone else.

Finally, a writ of certiorari should not be granted because no error was committed by the trial court, which correctly applied the minimum contacts test as enunciated by this Court. The trial court found that Petitioners had a wide range of contacts with New York, which were related to the disputed transactions. These contacts were found by the courts below to be sufficient to satisfy the due process clause.

I

THE COURT SHOULD NOT REVIEW THIS CASE AS REVERSAL WOULD NOT CHANGE THE RESULT BELOW. THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR JURISDICTION IN NEW YORK

The courts below found on the basis of uncontroverted facts that Petitioners subjected themselves to personal jurisdiction in New York by affirmatively using New York as a forum for litigating their claims against Respondent (9a-10a). The trial court wrote that this fact "disposes of the question of jurisdiction" (10a).

By voluntarily subjecting themselves to the New York courts to try their claims against Respondent, Petitioners waived any objection to the personal jurisdiction of New York courts. Petitioners' affirmative use of the New York courts creates an adequate and independent state ground to support the result below.

This Court should not review the decisions below because the state common-law waiver ground would sustain that decision regardless of any error by the courts below on the constitutional question.[2] Thus, any decision by the Court on the federal constitutional question would be advisory and would not change the result below.

This Court consistently and repeatedly has refused to exercise jurisdiction to review cases in which the decision rests upon an adequate and independent state ground. Michigan v. Long, ___ U.S. ___, 103 S.Ct. 3469, 3474-78 (1983); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Abrie State Bank v. Bryan, 282 U.S. 765, 773-75 (1931):

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2. The New York Court of Appeals dismissed Petitioners' attempted appeal as of right to that court on the ground that "no substantial constitutional question is directly involved" (2a).

> "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground." Michigan v. Long, ____ U.S. at ___, 103 S. Ct. at 3475.

Here, the state court decision indicates clearly and expressly that it is alternatively based on the separate and independent state law ground of waiver. This Court should not undertake a review of that decision. The common law ground of waiver by voluntary submission to New York State court jurisdiction is well-established in New York jurisprudence (and not challenged by Petitioners). Flaks, Zaslow & Co. v. Bank Computer Network Corp., 66 A.D.2d 363, 366-67, 413 N.Y.S.2d 1, 3 (1st Dep't 1979) (By availing itself of New York court for affirmative relief, defendant waived its objection to personal jurisdiction); Biener v.

Hystron Fabrics, Inc., 78 A.D.2d 162, 166, 434 N.Y.S.2d 343, 346 (1st Dep't 1980) (Defendant who uses New York court as his own jurisdictional forum waives his objection to personal jurisdiction); Revona Realty Corp. v. Wasserman, 4 A.D.2d 444, 448, 166 N.Y.S.2d 960, 964-65 (3rd Dep't 1957), appeal denied, 8 A.D.2d 666, 185 N.Y.S.2d 792 (3rd Dep't 1959) ("To the extent that defendant sought affirmative relief by an order . . . directing a trial on the merits," defendant waived any objection to personal jurisdiction); Fox v. Montenegro, 61 Misc.2d 1, 4, 304 N.Y.S.2d 624, 627 (Civ. Ct. Kings 1969), aff'd, 63 Misc.2d 242, 312 N.Y.S.2d 744 (App. Term, 2d Dep't 1970) ("A defendant cannot deny jurisdiction over his person and at the same time urge merits"); Gundersheim v. Kurcer, 28 Misc.2d 463, 465, 213 N.Y.S.2d 346, 348 (Sup. Ct. Queens 1961) (same).

Personal jurisdiction based on waiver of any objection thereto is independent of the "minimum contacts" federal requirement. Under New York law such a waiver supports a finding of personal jurisdiction even in the absence of "minimum contacts." In Flaks, Zaslow & Co. v. Bank Computer Network Corp., supra, the Appellate Division held that by moving for summary judgment on its counterclaim, defendant waived its objection to personal jurisdiction despite an earlier finding that there were insufficient contacts with New York to justify the Court's jurisdiction over defendant. 66 A.D.2d at 366-67, 413 N.Y.S.2d at 3. In Biener v. Hystron Fabrics, Inc., supra, the same Court wrote: "Where a defendant evinces an intention to make the court his own forum, he waives the jurisdictional objection even though it has been pleaded." 78 A.D.2d at 166, 434 N.Y.S.2d at 346.

There is no requirement in New York practice that counterclaims, even if related to the main claim, be asserted in the same action. See New York Civil Practice Law and Rules ("CPLR") 3019(a); contrast Fed. R. Civ. P. 13(a). Petitioners were free to sue Respondent in Mexico or Texas but chose instead to counter-sue in New York and press those claims to trial. Indeed, that the trial below required sixteen days (8a) is primarily attributable to the trial of Petitioners' affirmative claims, which Petitioners vigorously pressed.[3]

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3. Petitioners belatedly and unsuccessfully sought leave to commence a new action in federal court for the Southern District of New York. Since the federal courts had exclusive subject matter jurisdiction over certain of Petitioners' counterclaims, those claims could have been brought in any federal court having jurisdiction over Respondent. Instead, Petitioners sought to assert those claims as plaintiffs in the federal district court in New York:

(footnote cont'd)

Petitioners' prosecution of their counterclaims for affirmative relief against Respondent in the New York State trial court and their request for removal to federal court in New York to prosecute their federal claims are conclusive evidence of their submission to personal jurisdiction of the New York courts. Those acts constituted a knowing waiver of any jurisdictional objection, as the trial court found (8a-10a), independent of the "minimum contacts" and "doing business" tests for the assertion of

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(footnote 3 cont'd)

> "[W]e are prepared to accept [as] a condition [of dismissal of Respondent's action] that within 30 days after the entry of an order granting dismissal, the Defendants [Petitioners] will institute an action in the Federal District Court for the Southern District of New York against the Plaintiff [Respondent]." Affirmation of Arnold S. Schickler dated 2/13/81 at 14 (2ra); emphasis added.

personal jurisdiction over Petitioners under CPLR 302(a)(1).

Petitioners' consent to jurisdiction cannot now be revoked because they are dissatisfied with the result in the courts below. That consent is an adequate and independent ground for sustaining the decisions below, and this Court accordingly should not review those decisions.

II

THE DECISIONS BELOW SHOULD NOT BE REVIEWED BECAUSE THERE ARE NO "SPECIAL AND IMPORTANT REASONS" FOR GRANTING REVIEW

This Court should not exercise its discretion to review the decisions below where, as here, there are no "special and important reasons" for granting a writ of certiorari.

Petitioners purport to find a conflict between the holding of this Court in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and the decisions of the courts below. Petitioners contend that there was no connection between Respondent's cause of action (the deficit balance in Petitioners' account) and Petitioners' activities in New York because: (i) while the speculations in Petitioners' accounts occurred on the New York Commodity Exchange,

Petitioners did not request that those speculations occur in New York; and (ii) Petitioners maintained supposedly unrelated and limited bank accounts in New York (Petition for Writ of Certiorari ("Pet.") at 17).

The alleged conflict does not exist and Petitioners' contentions are in error (see III below). The decisions below involved the application of the well-settled legal doctrine of "minimum contacts" to the particular facts of this action (Pet. at 8-9; 8a-10a). As Petitioners concede (Pet. at 16):

> "Necessarily decisions relating to the appropriate application of sufficient contacts intertwine findings of fact on an ad hoc basis. This is not usually appropriate matter for review by this Court in the exercise of its discretion . . . ."

Petitioners point to no conflict between the decisions below and those of any federal court of appeals or other state court of last resort (Supreme Court Rule 17.1(b)). Nor do Petitioners suggest that the decisions below involve a unique question of federal law that should be settled by this Court or decide a federal question in a way in conflict with applicable decisions of this Court (Supreme Court Rule 17.1(c)).

Instead, pointing to the particular facts of this case (Pet. at 17), Petitioners argue that: (i) in applying the facts of this case to New York decisional law, "[t]he courts of New York have strayed from their previous decisions interpreting the N.Y. CPLR §§ 301 and 302" (Pet. at 26); and (ii) the facts of this case should result in a different decision under International Shoe Co. v. Washington, 326 U.S. 310 (1945) (Pet. at 26).

Petitioners' first argument does not raise any "special and important reasons" for this Court to grant certiorari, since the province of this Court is not to resolve conflicts within a particular state's jurisprudence. Here the New York Court of Appeals dismissed Petitioners' attempted appeal as of right on the ground that "no substantial constitutional question is directly involved" (2a). Subsequently the same court denied Petitioners' motion for leave to appeal (1a).

With respect to Petitioners' second argument, it is not appropriate for this Court to review the minutiae of factual disputes. This is not an extreme or unusual case on its facts; accepting Petitioners' assertions at their strongest, this case turns on the trial court's evaluation of voluminous documentary and testimonial evidence.

Accordingly, neither ground advanced by Petitioners supports the granting of a writ of certiorari.[4]

Supreme Court Rule 17.1 (formerly Rule 19), formulated almost 60 years ago, embodies the salutary policy that the Court has a limited reviewing function and that there is a vital interest in the sound management

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4. Contrary to Petitioners' argument that the assertion of personal jurisdiction by the court below "has a potentially national and international scope in that New York, in particular, is a center of international finance, banking and securities trading" (Pet. at 26), New York courts traditionally have held that because New York is the center of international finance, upholding jurisdiction is appropriate. Majique Fashions, Ltd. v. Warwick & Co., 67 A.D.2d 321, 414 N.Y.S.2d 916 (1st Dep't 1979); Bache Halsey Stuart Shields Incorporated v. Gantt, N.Y.L.J., October 29, 1979 at 7 (N.Y. Sup. Ct., Index No. 9182/79); Bache Halsey Stuart Shields Incorporated v. Klitzman, N.Y.L.J., June 5, 1980 at 12 (N.Y. Sup. Ct., Index No. 20311/79); Drexel Burnham Lambert Inc. v. D'Angelo, 453 F. Supp. 1294 (S.D.N.Y. 1978).

of scarce federal judicial resources. Justice Frankfurter articulated the reasons for limiting the Court's review to cases that are "special and important," writing that the Court does not (and, indeed, cannot) sit for the benefit of private litigants or for the resolution of cases presenting academic or episodic questions. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955).

Petitioners seek to involve the Court here in the review of the adequacy of the factual findings below to decide, as Petitioners concede, a case on an ad hoc or "episodic" basis. This is an inappropriate basis for review.

III

THE COURTS BELOW CORRECTLY FOUND THAT PETITIONERS HAD SUFFICIENT CONTACTS FOR NEW YORK COURTS TO ASSERT PERSONAL JURISDICTION OVER PETITIONERS

The trial court's decision correctly found the contacts between Petitioners and New York to be sufficient in this case to satisfy the due process requirements of International Shoe Co. v. Washington, 326 U.S. 310 (1945). The trial court found on the basis of the facts in the record that Petitioner had transacted business in New York with relation to the matter in dispute.

This finding clearly was correct. As the trial court wrote, summarizing the undisputed evidence with respect to Petitioners' contacts with New York:

> "The facts indicate that [Petitioners] had various securities and commodities dealings with [Respondent] in New York over a significant period of time. Furthermore, [Petitioners] agreed

that with respect to their accounts that they would be 'governed by the laws of the State of New York.'

"As a basis for securing credit from [Respondent], [Petitioners] referred [Respondent] to their business relationship which they had maintained for some time with the Chase Manhattan Bank [in New York].

"Harari, in addition, stated that he had come to New York at various times to conduct several financial undertakings. Apparently the other [Petitioners] visited New York City in 1979 to open an account with the brokerage firm of Merrill Lynch, Pierce, Fenner & Smith. Harari also opened an account with Citibank in New York City, consisting of a checking account and a Certificate of Deposit in excess of $100,000.00. ...

"...Jose Harari offered to pledge a non-negotiable Certificate of Deposit held at the Chase Manhattan Bank in New York as collateral for payment [to Respondent]." (9a, 14a)

Petitioners do not dispute the facts evidencing their transaction of business in New York. Instead, Petitioners argue that none of those contacts by itself would

satisfy the "minimum contacts" test. (Pet. at 17-25) Petitioners' argument erroneously focuses attention on individual contacts rather than the totality of Petitioners' contacts with New York.[5] Here Petitioners'

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5. In making a similar argument below, Petitioners' own brief to the Appellate Division contained additional admissions of contacts with New York related to this action, including

(i) ". . . that the monthly statements were prepared in New York and mailed directly to the Hararis. . ." (4ra-5ra);

(ii) ". . . that the margin loans for securing trading in the Hararis' account were arranged through the New York office . . ." (5ra);

(iii) that the Hararis maintained three bank accounts "at Chase Manhattan Bank [in New York City]" (6ra);

(iv) ". . . that Jose Harari had come to New York on one or two occasions in connection with his checking account and possibly a certificate of deposit" (7ra); and

(v) "that in September of 1979 [Jose Harari] opened a securities account in New York City with Merrill Lynch, Pierce, Fenner & Smith" (id.).

contacts with New York, as found by the trial court, were purposeful and plentiful.

Moreover, those contacts were directly related to this dispute, thus subjecting Petitioners to in personam jurisdiction under CPLR 302(a)(1). Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 261 N.Y.S.2d 8, cert. denied, 382 U.S. 905 (1965) (nondomiciliary defendant held subject to in personam jurisdiction where he performed "purposeful acts . . . in relation to the contract" and the exercise of jurisdiction held constitutional under International Shoe and its progeny); Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc., 32 N.Y.2d 583, 586, 347 N.Y.S.2d 47, 49 (1973) (in accord with International Shoe, nondomiciliary third party defendant held subject to in personam jurisdiction regardless of whether actually present in New York, because the New York

connections of the contract alone were sufficient).

In a case similar to this one, a New Jersey defendant who purposefully traded on New York stock exchanges through plaintiff, a brokerage house, was held to have transacted business in New York pursuant to CPLR 302(a)(1) and was held subject to a New York court's in personam jurisdiction as to plaintiff's claim for a deficit in defendant's account. Francis I. duPont & Co. v. Chelednik, 69 Misc.2d 362, 330 N.Y.S.2d 149 (App. Term, 1st Dep't 1971). The court wrote:

> "[O]peration of the account in New York constituted the transaction of business in New York. One need not be physically present in New York to be subject to the jurisdiction of our courts under CPLR 302. One 'can engage in extensive purposeful activity here without ever actually setting foot in the State.' (Parke-Bernet

> Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 17, 308 N.Y.S.2d 337, 340, 256 N.E.2d 506, 508)." 69 Misc.2d at 363, 330 N.Y.S.2d at 150 (emphasis added).

The trial court considered all relevant evidence concerning Petitioners' contacts with New York and, consistent with International Shoe Co. v. Washington, supra, found sufficient contacts to support personal jurisdiction.

CONCLUSION

For the foregoing reasons, the Court should dismiss Petititoners' petition for a writ of certiorari to the Appellate Division, First Department, of the Supreme Court of the State of New York.

Dated: New York, New York
January 23, 1984

Respectfully submitted,

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APPENDIX

Pages 14-15 of Affirmation of
Arnold S. Schickler, dated 2/13/81

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Finally, with regard to CPLR 327 and our application for alternative relief thereunder, the following observations should be made. Our requests for dismissal on condition under this Section of law are made in good faith and with practical legal reasoning. By no means have we attempted to "fool" the Court as is alleged in paragraph 4 of the Miller affidavit and other places therein. To the contrary, we indicated to the Court the basis for granting the relief under this Section of law. We now note that the major objection and opposition advanced by Plaintiff as to the Court granting relief under this Section of law, is that it may lose its attachment and jurisdiction over the Defendants. The Defendants are prepared to accept as a condition of a dismissal under this

Section that the attachment and jurisdiction shall continue as it existed in this action. Further, to obviate the claims of an attempt to delay, we are prepared to accept a condition that within 30 days after the entry of an order granting dismissal, the Defendants will institute an action in the Federal District Court for the Southern District of New York against the Plaintiff. Obviously, the Court, should it grant relief under this Section, can impose all appropriate conditions so as to insure that neither party has an opportunity to take advantage of the other.

Throughout the Miller affidavit and their Memoranda of Law, through the use of language, the attempt is made to leave the impression that some matters are disputed and some are not, that representations were made and the like. I wish to reiterate that by

failing at this time to handle, by chapter and verse, each and every statement of the Plaintiff in their papers, we by no means admit or concede the same. In point of fact, the only items with regard to Plaintiff's motion to which we concede are that the first affirmative defense and sixteenth counterclaim in Defendants' original answer are insufficient.

WHEREFORE, it is respectfully requested that Plaintiff's motion be in all respects denied and Defendants' cross-motion be in all respects granted.

Dated: New York, New York
February 13, 1981

S/_____
ARNOLD S. SCHICKLER

Pages 21-24 of Petitioners' Brief to the Appellate Division, First Department of the Supreme Court of the State of New York

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Despite the foregoing facts, it is respectfully submitted that the trial court erred in holding that the court had in personam jurisdiction over the defendants. From the evidence adduced at trial, it is uncontroverted that all of the contacts between the Hararis and Bache were at Bache's office in San Antonio, Texas. Furthermore, the record is void with respect to there ever having been any telephone calls between the Hararis and Bache's office in New York, or with there having been any personal visits by any of the Hararis to any Bache office in New York. In fact the only connection whatsoever between the Hararis, Bache and New York was that the monthly statements were prepared in New York and mailed directly to the Hararis

in Mexico (A-208) (although the confirmation slips for individual transactions were sent out from the San Antonio office (A-209)), that the margin loans for securing trading in the Hararis' account were arranged through the New York office (A-206), and that Bache had selected the New York COMEX for the execution of the Hararis' orders (A-299).

With respect to the last factor, that Bache had selected the New York COMEX for the execution of the Hararis' orders, it is most significant to note that when the Hararis opened their account with Bache there was no discussion as to where or on what exchanges stocks and commodities were to be traded (A-298); that the Hararis never directed that any of their futures contracts be purchased on the New York COMEX; and that Bache was at all times free to execute any orders on the New York COMEX, the Chicago

Commodities Exchange, the London Exchange, or any other exchange in which the Hararis' orders could be executed.

With respect to any bank accounts maintained by the Hararis in New York, the testimony at trial revealed that on May 20, 1975 a time deposit account was opened at Chase Manhattan Bank in the names of Jose and/or Salvador Harari, a savings account was opened in the name of Jose and/or Renee Harari on April 29, 1977, and a checking account was opened in the names of Jose and Salvador Harari on May 20, 1975 (A-229-230). With respect to the time deposit account at Chase Manhattan Bank, it should be noted that it was opened with a $100,000 deposit but that there were no additional principal deposits made after the account was first opened on May 20, 1975 (A-231-232). The savings account referred to above was opened with a $3,100 deposit on April 29, 1977 and

no additional deposits were made (A-232-233). The initial deposit for the checking account in May of 1975 was $1,000 and there were either no other deposits made or one other small deposit made into that account (A-234).

The evidence also reveals conclusively that the Hararis were Mexican citizens who had never lived in any other country (A-300). With respect to the period of time during which the Bache account was maintained, between May of 1978 and February of 1980, the only connections between the Hararis and New York were the bank accounts referred to previously, that Jose Harari had come to New York on one or two occasions in connection with his checking account and possibly a certificate of deposit, and that in September of 1979 he opened a securities account in New York with Merrill, Lynch, Pierce, Fenner & Smith (A-339-44).

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